Re Sarjit Singh Khaira

HIGH COURT (KUCHING) — ORIGINATING MOTION NO KG 4 OF 1989
HAIDAR J
4 JULY 1989

Civil Procedure — Leave to apply for order of certiorari — Application for leave made out of time — No account given for delay — Oral application for extension of time not made in proper manner — Rules of the High Court 1980, O 53 r 1(A)

Civil Procedure — Certiorari — Form for application for order of certiorari — Statement of claim and affidavits not stating names of parties —Rules of the High Court 1980, O 53 & Form 9

The applicant was a senior accounting officer in the service of the state government of Sarawak. He sought leave by way of originating motion for an order of certiorari to quash the decision made by the State Public Service Commission Sarawak to dismiss him from the state service as an accounting officer with effect from 1 January 1989. The application was supported by a statement pursuant to O 53 r 1(2) and his affidavit verifying the facts relied on. Leave was granted and during the hearing of the substantive application, the Deputy State Attorney General, for the respondent, raised two preliminary objections, namely:

1 The applicant's statement of claim and his various affidavits do not disclose the names of the parties.
2 The application for leave to apply for an order of certiorari was made out of time.

Held, allowing the respondent's second preliminary objection and dismissing the applicant's application:

(1) An application for an order of certiorari is not in the nature of a regular action involving plaintiffs and defendants. There is no special form provided in the Rules of the High Court 1980 for actions under O 53. The form used in this action substantially complied with Form 9 in respect of an originating motion action and is not defective. The first preliminary objection therefore failed.

(2) An application for leave to apply for an order of certiorari must be made within six weeks after the date of the proceeding. The period of time after the date of proceeding runs from the date of the order sought to be removed, ie the date when the decision was made, and not from the date when notice of it was received by the aggrieved person. In this case, the first letter sent to the applicant informing him of the decision did not state the actual date of the decision; the court therefore took the date of that letter as the date of the decision.

(3) The applicant was two days out of time. No account was given for the delay in filing the application. The respondent's second preliminary objection therefore succeeds.

(4) The oral application of the applicant for enlargement of time was not made in a proper manner as the application in the notice of motion was for leave to apply for an order of certiorari, and this application itself being out of time, was therefore not properly before the court. The court could not therefore entertain the oral application.

[*Editorial Note*: The applicant's appeal to the Supreme Court vide Civil Appeal No 01-36 of 1989 was heard on 20 November 1989. The appeal was dismissed.]

Cases referred to

1 *Mersing Omnibus Co Sdn Bhd* v *Minister of Labour and Manpower & Anor* [[1983] 2 MLJ 54 (folld)
2 *Ravindran* v *Malaysian Examinations Council* [1984] 1 MLJ 168 (folld)

Legislation referred to

Rules of the High Court 1980 O 2 r 1(2), O 3, O 53 rr 1, (2), 1A

TO Thomas for the applicant.
Abdul Hamid Mohd Yusoff (Deputy State Attorney General) for the respondent.

Cur Adv Vult

Haidar J: The applicant, Sarjit Singh Khaira, a senior accounting officer in the service of the state government of Sarawak by way of Originating Motion No Kg 4 of 1989 filed on 4 February 1989, pursuant to O 53 r 1, seeks leave of the court to apply for an order of certiorari for the purpose of quashing the decision made by the State Public Service Commission Sarawak ('the Commission') on 22 December 1988, whereby it was ordered that he be dismissed from the state service as an accounting officer with effect from 1 January 1989. It is supported by a statement pursuant to O 53 r 1(2) and his affidavit verifying the facts relied on. Notice of this ex parte application was given to the Attorney General in compliance with O 53 r 1(3).

On 13 March 1989 I heard the ex parte application and after hearing his counsel, I granted leave accordingly and costs of the application to be in the cause. On 14 March 1989, the applicant filed the notice of motion under O 53 r 1(2) pursuant to the leave granted by the court.

When the substantive application for certiorari came for hearing before me on 4 July 1989, the learned Deputy State Attorney General raised preliminary objection on two grounds, namely:

(i) The applicant's statement of claim and his various affidavits do not disclose the names of the parties.
(ii) The application for leave to apply for an order of certiorari was made out of time.

Before I could proceed to hear the preliminary objection of the respondent, Mr Thomas, counsel for the applicant, objected to the preliminary objection on the grounds:

(a) there has been a delay of four months to do so by the respondent and therefore such delay is not within reasonable time; and
(b) the preliminary objection should be by way of summons or motion.

Encik Hamid, the Deputy State Attorney General, prayed for the court to exercise its discretion under O 2 r 1(2) in order that justice may be done. Mr Thomas asked for costs of the day if the court is mindful of exercising its discretion for which Encik Hamid agreed to pay the costs. I accordingly allowed Encik Hamid's application for the court to

exercise its discretion under O 2 r 1(2) and ordered the respondent to pay the costs as agreed.

As I was about to proceed with the hearing of the preliminary objection, Mr Thomas complained that the notice of objection filed by the respondent was received by him on Saturday, 1 July 1989 and when he wanted to file an affidavit in reply on 3 July 1989, the High Court registry refused to accept it on the ground that it was filed out of time. Encik Hamid said that he had to file his notice of objection late as he had difficulty to get the state government to look into this case. In that event I decided to adjourn the hearing of the preliminary objection and the substantive application for the proper documents to be filed and I set aside my earlier order under O 2 r 1(2) as Mr Thomas then indicated that he will be objecting to the preliminary objection of the respondent. To say the least, there was a bit of confusion over the procedural wrangle.

After I adjourned this case, Mr Thomas managed to file the affidavit in reply in the court on the same day and served it on Encik Hamid straight away. Message was conveyed to me that the parties wanted this case to be continued on the same morning, ie 4 July 1989. I agreed.

On resumption of the hearing, Mr Thomas withdrew his earlier objection on the mode of the filing of the preliminary objection and the affidavit by the respondent and Encik Hamid confirmed the receipt of the affidavit in reply of the applicant and had no objection to the late service of same on him. Accordingly I proceeded to hear the preliminary objection.

Ground (i)

I agreed with the submission of Mr Thomas that an application for an order of certiorari is not in the nature of a regular action involving plaintiffs and defendants. In any event there is no special form provided in the Rules of the High Court 1980 for actions under O 53. The form used presently in this action is substantially in compliance with Form 9 in respect of an originating motion action. There is nothing defective in the form used and therefore nothing to be corrected. This ground failed.

Ground (ii)

Encik Hamid contended that according to O 53 r 1A an application for leave must be made within six weeks after the date of the proceeding and relied on the Federal Court case of *Mersing Omnibus Co Sdn Bhd* v *Minister of Labour and Manpower & Anor*.[1] Abdoolcader FJ (as he then was) in construing the words 'date of the proceeding' in the said case at p 56, said:

> Order 53 r 1A is textually adopted totidem verbis (except for the period specified) from O 53 r 2(2) of the English Rules of the Supreme Court prior to its amendment in 1977, and in an annotation in Vol 1 of 1976 *Supreme Court Practice* (at p 801) it is specifically stated that the period of time stipulated in the rule after the date of the proceeding in an application for leave for certiorari runs from the date of the order sought to be removed. The propriety of this construction is reinforced by r 4 of the new English O 53 for application for judicial review introduced in 1977, which provides for an application to be made promptly and in any event within three months from the date when grounds for the application first arose and then goes on in sub-rule (2) thereof to define, where the relief sought is an order of certiorari, the date when grounds for the application first arose as the date of the judgment, order, conviction or proceeding.

His Lordship further on at the same page said:

> The very point we have taken was considered and discussed some two months ago in *Griffiths & Anor* v *Secretary of State for the Environment & Anor* [1983] 2 WLR 172, in which the House of Lords held that when the Secretary of State gave a decision on an appeal under the Town and Country Planning Act 1971 against a refusal of planning permission, the six weeks provided for in that Act for making an application to the High Court to quash the order on certain limited grounds ran from the date when the decision was made and not from the date when notice of it was received by the aggrieved person and that decision was made on the date stamped on the decision letter.

According to paras 4 and 5 of the affidavit of Datuk Polycarp Sim Cheng Mong, acting chairman of the Commission dated 1 July 1989, the decision to dismiss the applicant from the state service was made by the Commission on 14 December 1988. The said decision of the Commission was conveyed to the applicant vide letter dated 22 December 1988 by registered mail (see exh DPS-1). However, another letter dated 30 December 1988 (see exh DPS-2) was sent by registered mail to the applicant informing him of same but DPS-2 was merely to correct the designation of the applicant which was wrongly referred to as 'pegawai kerja akaun' instead of 'pegawai kerja akaun kanan' in DPS-1. In the affidavit in reply of the applicant dated 13 July 1989 to the affidavit of Datuk Polycarp Sim Cheng Mong dated 1 July 1989, the applicant admitted in para 7 thereof receiving DPS-1 sometime after Christmas but not DPS-2. Whatever it is, the applicant did receive DPS-1 but however in DPS-1 the date of the decision of the Commission was not mentioned in DPS-1. In the absence of the actual date of the decision of the Commission in DPS-1, it necessarily implies therefore that the date of DPS-1, ie 22 December 1988, is the date of the decision of the Commission. As the applicant deposed that DPS-2 was never communicated to him, he must have acted on DPS-1 in filing the application for leave for an order of certiorari to quash the decision of the Commission. This is confirmed by the relief sought at para 2 of the applicant's statement filed pursuant to O 53 r 1(2) (see encl 3). In that event 22 December 1988 will have to be taken as the date when the decision was made for the purpose of computation of the six weeks' requirement under O 53 r 1A. If that be the case the applicant is out of time by two days.

As regards the applicant's allegation that the affidavit of Datuk Polycarp Sim Cheng Mong being 'a worthless substitute for a proper affidavit of service of the documents in question by the person/persons who allegedly served them on me', I do not consider the allegation to be relevant as the applicant himself admitted receipt of DPS-1 after Christmas (see para 7 of his affidavit in reply dated 3 July 1989).

Next, the applicant did not account for the delay in filing the application and therefore there is nothing for me to consider on the issue of delay.

Mr Thomas orally applied for extension of time under O 3 if the court were to rule against the applicant on the delay. On this issue, it is appropriate for me to quote the judgment of the Federal Court in the case of *Ravindran* v *Malaysian Examinations Council*[2] where at p 169 Hashim Yeop A Sani FJ (as he then was) said:

> The meat of the complaint of the appellant is contained in para 14 of his affidavit (p 9) supporting his application for leave which affidavit also purported to apply for an enlargement of time. It is clear that the application for an enlargement of time was not made in a proper manner as the application in the notice of motion was for leave to apply for an order of certiorari. The application in the notice of motion, itself being out of time, was therefore not properly before the court.

It is clear, in my view, that the oral application of Mr Thomas could not be entertained by the court.

As a result the applicant was without the time prescribed in O 53 r 1A and the delay was not accounted for and the extension of time was not made in a proper manner. The court accordingly had no jurisdiction to grant leave. According to Hashim Yeop A Sani FJ (as he then was) in *Ravindran*'s case:[2] 'Whether the application for an order of certiorari had merits or not was irrelevant.'

In the result, I allowed the preliminary objection of the respondent, as in the words of Hashim Yeop A Sani FJ (as he then was): 'There had been no jurisdiction to hear the application for certiorari because O 53 r 1A of the Rules of the High Court 1980 expressly directs that leave shall not be granted 'unless the application is made within six weeks after the date of the proceeding'.' The originating motion was accordingly dismissed with costs to be taxed unless agreed.

Application dismissed.

Solicitors: *TO Thomas & Co.*

Reported by *Zarinah Marican*

Ng Choon Mon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor and another application

HIGH COURT (SEREMBAN) — CRIMINAL APPLICATION NOS 54-60 OF 1988 AND 54-61 OF 1988
MUSTAPHA HUSSAIN J
24 APRIL 1989

Preventive Detention — Habeas corpus — Whether Minister's clearance for further detention required — Whether Minister required to make regulations prescribing time period for submission of investigation report to inquiry officer — Effect of failure to make such regulations — Whether Advisory Board had power to recommend extension of original detention order — Grounds for original detention order differing from grounds for extension order — Effect of — Dangerous Drugs (Special Preventive Measures) Act 1985, s 11(1) & (4) — Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985, ss 5(1)(b), 8(b) & 11A(1)(aa)

Both applicants were arrested and detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('Act 316') and the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1985 ('Act A629'). Their initial detention for two years was extended for a further two years. Both applicants applied for habeas corpus on the basis of six grounds:

(1) That on the basis of s 3(2)(c) of Act 316, the authorization for detaining for more than 14 days was without the approval and consent of the Minister as impliedly required by the law.

(2) That no specific officer was appointed to conduct the investigations and whether a complete report had been submitted to the inquiry officer and the Minister within a prescribed time period.

(3) That the inquiry officer failed to conduct his own independent inquiry to verify the report submitted to him under s 3(3) of Act 316 by the investigating officer; and the Minister had failed to make regulations for the time period for the inquiry officer to submit the reports under s 5(4) of Act 316.

(4) That the detention orders only stated that the applicants had been or were associated with trafficking in dangerous drugs and omitted to state the Minister's satisfaction that their detentions were necessary in the interest of public order.

(5) That the power of the advisory board under s 11(4) of Act 316 to report its opinion for extension was taken away by Act A629, leaving its function to review and report its opinions to two specific matters, ie whether the detention should cease or continue for the period remaining on the original detention.

(6) That s 11A(1) requires that the Minister, when extending the detention order, shall set out in the direction the grounds for the extension and state whether the grounds are the same, different, or partly the same as and partly different from, the grounds of the original detention order.

Held, allowing the applications and issuing writs of habeas corpus:

(1) The wording of s 3(2)(c) of Act 316 is clear. It merely states that the DSP shall forthwith report to the Minister but does not state that he is to obtain the Minister's clearance for further detention.

(2) Under the second ground, counsel contended that the submission of the complete report by the police officer of the